

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of:

Michael Wegner
Wegner Oil of Lebanon, Inc.
N890 Highway 109
Watertown, Wisconsin 53098

PECFA Claims: 4 53094-9608-90 A & B
Hearings: #98-97 and #98-98

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed July 23, 1998, under § 101.02(6)(e) Wis. Stats., and § Comm/ILHR 47.53 Wis. Adm. Code, to review a decision by the Wisconsin Department of Commerce (Department), a hearing was commenced on August 24, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on October 22, 1999, and the parties were provided a period of twenty (20) days to file objections.

The Issue for determination is:

Whether the Department's decisions, dated June 25, 1998, attributing the petroleum contamination of the Appellant's site to one occurrence and limiting the site investigation costs to \$40,000.00 were correct.

There appeared in this matter the following persons:

PARTIES IN INTEREST:.

Michael Wegner
Wegner Oil of Lebanon, Inc.
N890 Highway 109
Watertown, Wisconsin 53098

(In Person)

Wisconsin Department of Commerce.
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kristiane Randal, Esq,

Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned. by the Secretary of the Department pursuant to § 560.02(3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision except that the first sentence of the second full paragraph on page 3 of the Proposed Hearing Officer Decision shall be deleted and replaced with "The consultant was understood to believe that the law limited site investigation costs to \$40,000.00 for each occurrence"

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important or you must describe your new evidence and tell why you did not have it available at the hearing in this

matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in § 227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in § 227.53 Wis. Stats.

Dated: 5/31/00

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce, 201 West
Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: 6-1-00

Mailed By: Kris Behnke

State of Wisconsin
DEPARTMENT OF COMMERCE

In the matter of:

The Claim for Reimbursement Pursuant
To the Provisions of the PECFA Program

By:

Michael Wegner
Wegner Oil of Lebanon, Inc.
Appellant,

vs.

Hearing Numbers 98-97 & 98-98
PECFA CLAIM #53094-9608-90 A & B

Secretary,
Wisconsin Department of Commerce
Respondent

PROPOSED DECISION

Notice of Rights

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above matter. Any party aggrieved by the proposed decision must file written objections to findings of fact conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Terry W. Grosenheider, Executive Assistant to the Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the Department of Commerce in this matter.

STATE HEARING OFFICER:
RONALD I. WEISBROD

DATED AND MAILED:
October 22, 1999

MAILED TO:

Appellant Agent or Attorney

Murthy Polasa, P.E.
Stiles Environmental, Inc.
W7694 Hwy. V
Lake Mills, WI 53551

Department of Commerce

Kristiane Randal,
Assistant Legal Counsel
PO Box 7970
Madison, WI 53707-7970

ISSUE

On June 25, 1998, the Wisconsin Department of Commerce (department), which was responsible for administering the PECFA program, issued two decisions to the appellant that when read in conjunction

with each other limited the appellant to reimbursement for site investigation costs to a total of \$40,000. The issue to be determined is whether those determinations were correct.

FINDINGS OF FACT

In 1993, Wegner Oil of Lebanon, Inc., (appellant), owned and operated an automobile service station and fuel storage facility containing two underground storage tanks (UST) and four aboveground tanks (AST) located on State Highway 109 in Lebanon, Jefferson County, Wisconsin. While doing some work on the underground tanks it discovered petroleum contamination. An environmental consulting firm was hired to determine the source and extent of the contamination and to oversee the remediation of its site. On August 19, 1993, its environmental consultant provided the initial notice of a claim for reimbursement to the Department of Industry, Labor and Human Relations (DILHR), the state agency then responsible for administering the reimbursement of expenditures for petroleum cleanup of sites pursuant to the Petroleum Environmental Cleanup Fund Act (PECFA). Thereafter, its environmental consultant investigated the extent of contamination at the site. In late 1994, the consultant discovered there was also contamination at the site from the ASTS.

By letter dated December 21, 1994, the environmental consultant requested that DILHR provide it with an interpretation of Wisconsin Admin. Code ILHR § 47.33(1)(a) and (2)(b) as applied to the appellant's situation that it described as AST and UST storage systems located 70 feet apart, both of which had a petroleum release to one continuous area of soil and one groundwater plume. The letter stated that the Wisconsin Department of Natural Resources had determined that both the UST and the AST releases were to be investigated and remediated as one site. The consultant was aware that it was to the appellant's advantage to have the site classified as one discharge because in that case there would be only one deductible applied. The consultant claims that its president had a telephone conversation with a program representative, who the president considered to be very knowledgeable and reliable, who told the president that the site would have two deductibles and that the remediation costs of the contamination from the USTs should be invoiced separate of the remediation cost of the contamination from the ASTS. However, no record of that conversation was produced nor was the program representative called on to testify.

Despite allegedly having been told already that it should keep costs separate and that the site would have two deductibles, on January 23, 1995, the environmental consultant sent another letter to DILHR requesting an opinion regarding whether it could continue as the appellant's consultant for the cleanup of the entire site or did the appellant have to seek bids for the AST cleanup. This letter had attached to it the December 21, 1994 letter. No other reports or evidence regarding the site were attached to the letter to substantiate the consultant's statement that these were separate occurrences.

Department records reflect that on January 27, 1995, a representative of the PECFA program attempted to respond to these letters by telephone, leaving a voice mail message, that apparently stated that the consultant could continue on the project as it was the same site with multiple occurrences and that new bids would have to be obtained only if the AST contamination was on a different parcel. Thereafter, the consultant advised the appellant that based on its "conversation" with the representative of the PECFA program on January 27, 1995, it would not be necessary for the appellant to obtain bids from three consulting firms for remediation of the aboveground storage tank spill; that because the USTs and ASTs were at the same address they would be considered to be one site and have the same PECFA number but that the remediation costs for the aboveground tanks and for the belowground tanks would have to be invoiced separately as they would have separate deductibles.

The consultant was aware that the law limited site investigation costs to \$40,000 for each occurrence. Historically, when the site investigation costs approached \$40,000, the consultant routinely requested approval for reimbursement of additional costs. However, the consultant did not notify DILHR in writing that the site investigation costs for the appellant's site would exceed \$40,000 and did not request approval for reimbursement of those additional costs. It expected that the department would classify this site as having two occurrences with two deductibles and permit separate site investigation costs. Following completion of the cleanup of the appellant's site, separate claims for reimbursement for cleanup of the AST and UST spills were submitted to the state agency. Each claim included site investigation costs that were less than \$40,000.

It is possible to have one or more spills or occurrences at one site. In either case the department treats it as one site and assigns only one PECFA identification number to the site.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stat. § 101.143 (1)(cs) provides as follows:

"Occurrence" means a contiguous contaminated area resulting from one or more petroleum products discharges.

Wisconsin Stat. § 101.143(3)(a)3 provides as follows:

The owner or operator or the person notifies the department, before conducting a site investigation or remedial action activity, of the discharge and the potential for submitting a claim under this section,

Wisconsin Stat. § 101.143(3)(h) provides as follows:

Initial eligibility review. When an owner or operator or the person notifies the department under par. (a)3., the department shall provide the owner or operator or the person with information on the program under this section' and the department's estimate of the eligibility of the owner or operator or of the person for an award under this section.

Wisconsin Stat. § 101.143(4)(b) provides, in part, as follows:

(b) Eligible costs. Eligible costs for an award under par. (a) include actual costs or, if the department establishes a schedule under par. (cm), usual and customary costs for the following items only:

3. Investigation and assessment of contamination caused by a petroleum product storage system or a home oil tank system.

Wisconsin Stat. § 101.143(4)(d) & (dm) provide, in part, as follows:

(d) Awards for claims; underground systems. 1. The department shall issue an award under this paragraph for a claim filed after July 31, 1987, for eligible costs, under par. (b), incurred on or after August 1, 1987, and before July 1, 1998, by the owner or operator of an underground petroleum product storage tank system. 2. The department shall issue the award under this paragraph without regard to fault in an amount equal to the amount of the eligible costs that exceeds a deductible amount of \$2,500 plus 5% of the eligible costs, but not more than \$7,500 per occurrence,

(dm) Awards for aboveground systems for a specified period. 1. The department shall issue an award under this paragraph for a claim for eligible costs, under par. (b), incurred on or after August 1, 1987, and before July 31, 1998, by the owner or operator of a petroleum product storage system that is not an underground petroleum product storage tank system if the petroleum product discharge on which the claim is based is confirmed and activities under sub. (3)(c) or (g) are begun before July 1, 1998. 2. The department shall issue the award under this paragraph without regard to fault in an amount equal to the amount of the eligible costs that exceeds the following deductible:

d. For the owner or operator other than an owner or operator under subd. 2. A., b. or c., \$15,000 plus 2% of the amount by which eligible costs exceed \$200,000.

Wisconsin Admin. Code ILHR § 47.015(35) provides as follows:

"Site Investigation" means the investigation of a petroleum product discharge to provide the information necessary to define the nature, degree and extent of a contamination and to allow a remedial action alternative to be selected.

Wisconsin Admin. Code ILHR § 47.355 (2), effective March 1, 1994, provides, in part, as follows:

MAXIMUM ALLOWABLE COST. The maximum allowable cost for a site investigation and development of a remedial action plan shall be no more than \$40,000, excluding interest, feasibility testing, and interim action costs, unless approved under par.

If the investigation will exceed \$40,000, the responsible party or its agent, shall contact the department in writing and provide an estimate of additional work and funding required and obtain the department's approval. If the additional approval is not obtained, costs above the \$40,000 level will not be reimbursed.

DISCUSSION

The appellant conceded that the department's determination that this site had only one "occurrence" was correct. The appellant contended that it obtained an opinion from the department that it would be entitled to separate site investigation costs and that it then relied on that opinion to its detriment. The appellant contends that the department should be estopped from denying reimbursement of site investigation costs of up to \$40,000 for the contamination from the ASTs and from the USTs. Its contentions cannot be sustained. What actually took place when the AST contamination was discovered is the employer's consultant sent its letters to DILHR. The consultant's letters did not ask DILHR for an opinion whether the appellant would be entitled to a separate limit for the site investigation costs that would have to be incurred for the cleanup in the area of the ASTS. If it had, it appears certain that the department would have qualified any opinion by stating that the department could not be certain until the claim was submitted. The voice mail response from the department was interpreted by the consultant as an opinion that the department would ultimately rule there were two occurrences with two deductibles and separate site investigation cost limits. The evidence presented does not substantiate that the consultant was told by any representative of the department that there would be separate site investigation cost limits.

The department is not entitled to administer a law contrary to the legislature's intent. An employee of the department who interprets a law incorrectly cannot obligate the department to implement that incorrect interpretation. A State Hearing Officer does not have the authority to grant equitable relief. Moreover, the appellant did not establish any valid basis for its reliance on a preliminary opinion that its consultant had received from a representative of the department. It knew or should have known that the department could not make a final determination before the documentation was provided. Based on past experience with PECFA claims the consultant guessed how the appellant's claim would be treated when it was submitted to the department. It guessed wrong.

CONCLUSIONS OF LAW

The State Hearing Officer therefore finds that the appellant's site is limited to one site investigation amount not to exceed \$40,000, within the meaning of § 101.143(4)(b) of the statutes and ILHR § 47.355(2). of the Wisconsin Administrative Code.

DECISION

The department's decisions, dated June 25, 1998, attributing the petroleum contamination of the appellant's site to one occurrence and limiting the site investigation costs to \$40,000 are affirmed.

STATE HEARING OFFICER

By

Ronald I. Weisbrod
Administrative Law Judge

cc: Michael Wegner
Wegner Oil of Lebanon, Inc.